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Spinning the Legislative Veto*

GIRARDEAU A. SPANN**

I am delighted to have been given the opportunity to comment on Judge Breyer's proposal for a fast-track substitute to the legislative veto.¹ Although the Supreme Court invalidated the legislative veto device in *INS v. Chadha*,² Judge Breyer's proposal demonstrates that innovative thinking may well permit those with enough determination to circumvent the apparent effect of the Court's decision. Even more important, the proposal illustrates why such circumvention is possible.

As a doctrinal matter, the legislative veto poses a real dilemma—one that is rooted in fundamental uncertainty about the proper relationship between the Supreme Court and the elected branches of government. Because the Supreme Court tried to resolve the constitutional issues raised by the legislative veto without first resolving that dilemma, the *Chadha* opinion is unsatisfying. Its tone is glib; its reasoning is superficial; and its analysis is linguistic rather than functional in nature.³

Judge Breyer's fast-track proposal illustrates these defects in a rather dramatic fashion. By posing the pertinent constitutional issues in a way that cannot be resolved without directly confronting the underlying dilemma, Judge Breyer's veto alternative places so much strain on the reasoning of *Chadha* that the opinion threatens to burst apart at the seams. All of this not only permits clever lawyers and legislators to conjure up strategies for sidestepping the Court's decision, but precludes us, as well, from making any reliable determination of whether those strategies are consistent with the theory of our Constitution. Using the raw materials provided in the *Chadha* decision, it is possible to spin legal analysis of the legislative veto around and around until we get any answer concerning its validity that we desire. It strikes me that this is a useful thing to know, and we are indebted to Judge Breyer for providing the catalyst that makes it so apparent.

I. THE FAST-TRACK PROPOSAL

The legislative veto has been viewed by many as a useful device because it permits Congress to make broad delegations of authority to executive agencies while retaining the authority to invalidate particular exercises of that authority when it disapproves of what the executive has done.⁴ Of course, Congress can generally invalidate an act of the executive branch by passing a new statute,

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1. See Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785 (1984).

2. 103 S. Ct. 2764 (1983).

3. I have in the past argued that functional analysis is preferable to, and less dangerous than, linguistic analysis for a variety of reasons. See Spann, *Functional Analysis of the Plain-Error Rule*, 71 GEO. L.J. 945 (1983).

4. The history and purpose of the legislative veto, as well as many of the ideas expressed in this

but statutes are not always so easy to enact. They require the expenditure of enough time and political capital to amass the majorities or supermajorities needed for enactment. The legislative veto, however, permits Congress to invalidate an executive action with the concurrence of something less than the full majorities required for passage of new legislation. It is, therefore, a politically expedient way for Congress to exert control over executive agencies. Viewed in this light, as Judge Breyer points out,⁵ the legislative veto is a political compromise between efficiency on the one hand and accountability on the other.⁶

Broad delegations of power to executive agencies are efficient in two ways. First, they tend to be stated in general terms that facilitate enactment by reducing political opposition that might accompany more specific legislative proposals. Second, the breadth of agency delegations minimizes questions that might otherwise arise concerning an agency's statutory authority to take particular actions. However, this efficiency reduces the degree of accountability to which executive agencies are subject. As a result, Congress sought to provide a substitute form of accountability through retention of the power to veto particular exercises of agency authority. Even when a veto is not actually exercised, the threat of a veto is often enough to prompt executive officials to make concessions to the elected Members of Congress before taking potentially controversial actions.

Although *Chadha* declared the legislative veto to be invalid, it is not clear precisely why. As Judge Breyer has emphasized,⁷ the reasoning relied on by the Court was literal and mechanical. The Court merely declared the exercise of a legislative veto to be an act that was legislative in nature and, therefore, invalid for failure to comply with the article I enactment procedures prescribed for legislation.⁸ Because the Court offered no functional explanation of why the veto ought to be subject to the article I enactment procedures, the opinion is unsatisfying. Now, Judge Breyer has proposed an alternative to the veto device that demonstrates just how unsatisfying the *Chadha* opinion is.

Under Judge Breyer's alternative,⁹ executive actions taken pursuant to broad congressional delegations of power would not automatically have legal effect. Rather, they would serve as legislative proposals that would become effective only if affirmatively enacted by Congress. The internal rules of each House, however, would be amended to provide a "fast track" for such legislative proposals, pursuant to which the proposals would quickly be voted on by each House without procedural delays. This would provide a quasi-automatic process by which executive proposals could become law, but the procedure could be terminated with respect to any particular executive proposal through passage of a "derailing" resolution by one or both Houses. Such a resolution

article, are more fully developed in Spann, *Deconstructing The Legislative Veto*, 68 MINN. L. REV. — (1984) (forthcoming).

5. See Breyer, *supra* note 1, at 787-88.

6. To the extent that the legislative veto permits Congress to take actions that a majority of the Members of Congress would not agree to take, it is not a "legislative" veto at all. Rather, it is a veto exercised by some entity that is smaller than, and different from, Congress. See Spann, *supra* note 4.

7. See Breyer, *supra* note 1, at 790.

8. *Chadha*, 103 S. Ct. at 2780-88.

9. See Breyer, *supra* note 1, at 793-94.

would have the effect of taking the executive proposal off of the fast track and subjecting it to the normal legislative process, with all of its attendant political maneuvering and delays.

The derailing resolution would have roughly the same effect as a one- or a two-House veto, depending on which derailing option Congress selected, because it would strike roughly the same political compromise as that struck by the legislative veto.¹⁰ However, the fast-track proposal would not depart from the legislative procedures prescribed by article I, and would not, therefore, appear to be invalid under the terms of the *Chadha* decision. How then should the fast-track alternative be viewed in constitutional terms? Should it be viewed as constitutional because it satisfies the language of article I, or should it be viewed as unconstitutional because it serves the same purpose as that served by the unconstitutional legislative veto? Stated differently, was the Supreme Court merely disapproving of the manner in which Congress chose to strike the political compromise embodied in the legislative veto, or was it invalidating the political compromise itself? As it turns out, that question poses a dilemma so fundamental that it is easy to understand why the Court chose to avoid it.

II. THE DILEMMA

The dilemma is this: Constitutional theory both permits and precludes Congress from relying upon the legislative veto as a device for controlling executive action. Watch what happens when we undertake a functional analysis of the legislative veto.

Subject to certain exceptions that are not here pertinent,¹¹ Congress can exercise only legislative power, because that is the only power that it is granted under the Constitution.¹² The doctrine of separation of powers, which is implicit in the structure of the Constitution, requires the concurrence of three separate constituencies to make legislation valid. The Senate—which represents state interests, the House of Representatives—which represents the interests of local majorities, and the President—who represents the interests of the national majority all must agree on the desirability of a particular action before that action can have the effect of valid legislation.¹³ Consistent with our system of checks and balances, this three-constituency-concurrence requirement provides a degree of quality control over the development of federal policies that helps to ensure that imprudent legislative proposals will not be implemented. Because the legislative veto permits one or two Houses of Congress acting alone to implement legislative policy decisions without the concurrence of the three required constituencies, the veto is unconstitutional, in violation of separation of powers principles

10. The political compromise would not be precisely the same, however, for the reasons that Judge Breyer specifies. *See id.* at 794-95.

11. *See, e.g.*, U.S. CONST. art. I, § 5.

12. *See id.* art. I, § 1.

13. The separate-constituency theory was articulated most clearly in the legislative veto context by the United States Court of Appeals for the District of Columbia Circuit in *Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 461-65 (D.C. Cir. 1982), *aff'd mem.*, 103 S. Ct. 3556 (1983) (invalidating one-House veto with respect to agency rulemaking).

But the legislative veto is authorized by legislation. Moreover, that legislation is perfectly valid because it has been agreed to by the three separate constituencies specified in the Constitution, thereby satisfying our quality control standards. Both Houses of Congress and the President have determined that, in the contexts in which it is authorized, the legislative veto constitutes a prudent method of achieving a valid governmental objective. Because the legislative veto is an essential component of a perfectly valid piece of legislation, the veto is constitutional and is completely consistent with separation of powers principles.

Separation of powers principles are designed to ensure that the political process operates properly, but here, a properly operating political process has chosen to take an action that can be said to violate separation of powers principles. When the two conflict, which should prevail—the principle designed to protect the political process or the political process that the principle was designed to protect? It is not possible to resolve this dilemma without first adopting a normative position regarding the primacy of principle versus politics. That is what the Supreme Court failed to do in *Chadha*, and that is why the *Chadha* decision is unsatisfying. In more cosmic terms, the problems that plague the *Chadha* decision are the same problems that plague the legitimacy of judicial review itself. When we decide how we feel about judicial review, we should be able to decide how we feel about the legislative veto. Until that time, however, constitutional analysis is likely to be a somewhat dizzying experience. By making a minor modification to Judge Breyer's proposal I can illustrate what I mean.

III. ANALYTICAL SPIN

Judge Breyer's fast-track alternative is appealing because it closely approximates the political compromise that is struck by the legislative veto. As ingenious as the fast-track alternative is, however, it does not perfectly replicate that compromise.¹⁴ Luckily, I have developed the perfect alternative. Now, your initial reaction will be that my alternative is absurd and impractical, and you will be tempted to say, "Thank God for Judge Breyer and his down-to-Earth approach to this difficult subject." But on reflection, it should become apparent that mine is, indeed, the perfect alternative. My alternative proposal is called the "legislative veto!"

At the beginning of the next session of Congress, the Members of both Houses should meet to discuss the consequences of the *Chadha* decision. If they genuinely wish to use the legislative veto as a means of controlling executive discretion, and if they are willing to pay the price, the Members of Congress have it well within their power to exercise legislative vetoes that are every bit as effective as the veto invalidated in *Chadha*. They need only agree to rubber stamp, through affirmative legislation, all vetoes exercised by a designated House or Committee of Congress. My proposal differs from Judge Breyer's in that it does not rely on a rules change or any other method of formally binding legislators to the veto scheme. Moreover, because enactment

14. See Breyer, *supra* note 1, at 794-95.

of the affirmative legislation would be truly automatic under my scheme—Members would not even need to be told the subject matter of the bills for which they were voting—the entire process would replicate, rather than merely approximate, the efficiency of the traditional legislative veto; it would capture precisely the same political compromise. However, each veto will have been implemented through affirmative legislation, in accordance with the procedures specified in article I, thereby honoring the dictates of *Chadha*.

Because my legislative veto so effectively mirrors the legislative veto set aside in *Chadha*, one might well wonder whether it is truly constitutional. But the constitutional issue is easily disposed of. My legislative veto is nothing more than a standard political deal. Whenever a rubber-stamp bill is introduced, each legislator agrees to vote for that bill, even though he or she may not actually favor it, in exchange for the commitment of other legislators to vote for future rubber-stamp legislation that they might not favor. This is classic political logrolling, in its purest form. If the Court attempted to invalidate such a scheme it would be telling legislators that their votes were effective only if the Supreme Court approved of their motives in casting those votes. Such a holding would involve a separation of powers violation all right, but it would be the Supreme Court that was intruding impermissibly into the legislative process. *Chadha* may preclude Congress from binding itself to a legislative veto scheme by law, but it certainly cannot preclude the Members of Congress from making such a scheme politically binding.

As fate would have it, my legislative veto not only turns out to be constitutional, but it turns out to be a prudent policy choice as well. In fact, it turns out to be the most prudent policy choice imaginable. Not only will the scheme have been agreed to by the Members of Congress, but the scheme will be continuously reevaluated and immediately corrected if it ever proves to have become imprudent. The moment that the Congress ceases to believe that the scheme is warranted, the scheme will cease to work; the moment that too many legislators decide that they no longer wish to rubber stamp legislative vetos through affirmative legislation, the legislation will be defeated and the vetos will cease to be effective.¹⁵ Instantaneous political accountability . . . what could be better.

As I mentioned earlier, you may be thinking that such a scheme would be impractical and that it would never work because the Members of Congress would break ranks the first time they were called upon to rubber stamp a veto of which they disapproved on the merits. Well, I suppose that's right, but that's also the point. If Congress does not believe strongly enough in the legislative veto to pay the political price required to make it work, why should the veto continue to be an available legislative device? Wasn't the Supreme Court right to invalidate the legislative veto, because it would only be useful to a Congress that did not truly believe in the political compromise that the veto was intended to embody?

15. The scheme will continue to work as long as a majority of the Members of each House are prepared to vote in favor of a legislative veto. If a presidential veto is exercised, the scheme will continue to work as long as two-thirds of the Members of each House are prepared to vote in favor of the legislative veto.

If you are about to say "yes," think carefully before you answer. Just as we were able to predict that an informal veto scheme would not work because the Members of Congress might not always honor their political commitments, Congress too could make the same prediction. Why then should not Congress be able to guard against that danger by making the political commitments of its Members to a legislative veto scheme legally, as well as politically, binding? As long as the three pertinent constituencies agree that legal commitments are a prudent way to supplement political commitments, and they do so in accordance with the prescribed article I procedures, shouldn't the resulting legislation be legally effective?

Well, look where we are. We are right back on the horns of that dilemma again, and our analysis has simply gone around and around. But where else could it go? Until we resolve our ambivalence concerning the proper interaction of law and politics—of the Court and the elected branches of government—it is fitting that we go around in circles. At least those circles will remind us of how hopelessly interconnected law and politics appear to be.